

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

PREFILED TESTIMONY
OF
MASSOUD TAHAMTANI

EX PARTE: IN THE MATTER CONCERNING
RULES IMPLEMENTING THE STATE CORPORATION
COMMISSION'S AUTHORITY TO ENFORCE THE
UNDERGROUND UTILITY DAMAGE PREVENTION ACT

CASE NO. PUE990786

SEPTEMBER 22, 2000

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Q1. PLEASE STATE YOUR NAME AND POSITION WITH THE COMMISSION.

A1. My name is Massoud Tahamtani. I am an Assistant Director with the Commission's Division of Energy Regulation.

Q2. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?

A2. The purpose of my testimony is to: a) adopt the Staff report filed in this case on May 26, 2000, as part of my testimony, b) review the comments filed in response to the Staff's proposed rules, and c) present certain revisions to these rules.

Q3. PLEASE CONTINUE.

A3. The Staff's report dated May 26, 2000, is presented as Appendix 1 to this testimony. I adopt this report as part my testimony in this proceeding.

Q4. MR. TAHAMTANI, PLEASE REVIEW THE COMMENTS FILED IN RESPONSE TO THE STAFF'S PROPOSED RULES.

A4. By Order dated June 14, 2000, among other things, the Commission directed the Division of Energy Regulation ("Division") to provide notice to the public of the Staff's proposed rules. This Order also invited interested persons to file comments and request a hearing on the proposed rules, if desired.

In response to the Commission order, 16 parties filed comments. I have reviewed these comments and have considered the revisions to the rules proposed by the parties. In my testimony, I will focus on those rule revisions which were commented upon by most of the parties. For ease of reference, I will cite the full text of each proposed rule on which the parties have commented before presenting a summary of the comments, and a discussion of any revisions to the proposed rules. The Staff's proposed rules will be shown as underscored text.

Q5. WHICH RULE WILL YOU BE DISCUSSING FIRST?

A5. Rule 20 VAC 5-309-20. This rule with the Staff's proposed change states:

Any person, as defined in § 56-265.15 of the Code of Virginia, may report probable violations of Chapter 10.3 of Title 56 to the Division. The reports of probable violations may be submitted to the Division in writing, by phone, fax, e-mail, or in person. All written reports of probable violations shall include the information requested on SCC Form DPA-1, if available. All probable violations shall be reported to the Division within 30 days of a person becoming aware of the circumstances constituting the probable violations.

The Virginia Cable Telecommunication Association ("VCTA") and Cox Virginia Telecom, Inc. ("Cox") recommend that this rule be further revised to allow responses to the reports of probable violations to the Division to be made by phone, fax, e-mail, or in person.

The Staff does not object to adding language to this rule or more appropriately to Rule 20 VAC 5-309-30 to clarify the acceptable methods of responding to probable violations during Staff's investigation. Staff proposes to amend Rule 20 VAC 5-309-30 as follows:

Upon receipt of a report of a probable violation, the Commission Staff ("Staff") shall conduct an investigation to examine all the relevant facts regarding the reported probable violation. The investigation may include, among other things, records verification, informal meetings, teleconferences, and photo-documentation. Responses to reports of probable violations may be submitted to the Division in writing, by phone, fax, e-mail or in person. Upon completion of the investigation, the Staff shall review its findings and recommendations with the Advisory Committee established in accordance with § 56-265.31 of the Act.

**Q6. PLEASE COMMENT ON THE REVISION SUGGESTED BY
CAMPBELL COUNTY RELATIVE TO PROPOSED RULE 20 VAC
5-309-40 SUBDIVISION A 2.**

A6. This subdivision provides:

Issue an Information Letter to a county, city, or town alleged to have committed the violation;

Campbell County proposes to add the words "or political subdivisions" after the word "town." The Staff takes no position on this change, but notes, on advice of counsel, that §56-265.32 of the Code of Virginia exempts counties, cities and towns from civil penalties. This section provides that the Commission may inform counties, cities and towns of reports of alleged violations involving the locality. Political subdivisions are not mentioned specifically. The Staff's proposed rule tracks the language of the Underground Utility Damage Prevention Act ("Act") governing enforcement.

Q7. ARE THERE OTHER CHANGES PROPOSED BY THE COMMENTORS RELATIVE TO RULE 20 VAC 5-309-40?

A7. Yes. Columbia Gas of Virginia, Inc. ("Columbia"), Virginia Natural Gas, Inc. ("VNG"), Cox, the Associated General Contractors of Virginia, Inc. ("AGC"), and the Virginia Telecommunications Industry Association ("VTIA") all commented on the Staff's proposed change to Subdivision "B" of Rule 20 VAC 5-309-40 B. This subdivision provides that:

[i]n the event that the Staff but not the Committee recommends enforcement action, the Staff may request the Commission to issue a rule to show cause to make a final determination regarding any alleged violations of the Act, and shall, as part of its request for enforcement action, report to the Commission the Committee's recommendations and reason or reasons for the Committee's recommendations.

Columbia and VNG assert that the rule proposed by Staff fails to address the circumstances under which the Staff may elect to pursue a settlement when the Staff but not the Advisory Committee recommends enforcement action. VNG and Columbia note that the Staff is not currently bound by the Advisory Committee's recommendation and is in fact free to pursue an action before the Commission that is contrary to the recommendation of the Committee. According to the joint comments filed by VNG and Columbia, "[w]hile the Staff should be permitted to pursue a settlement under such circumstances [contrary to the Committee's recommendations] after an initial Commission review of the matter, the Staff should not be afforded an opportunity to ignore a consensus reached by the Committee where the Staff reached a conclusion that differs from the Committee." Columbia and VNG propose to amend the Commission's current Rule 20 VAC 5-309-40 B to authorize the Staff to pursue settlement negotiations under the following circumstances:

3. Enter into Settlement negotiations with the respondent. **However, when the Staff, but not the Advisory Committee determines that a violation may have occurred, the Staff may not pursue a settlement absent the initiation of a show cause or other equivalent proceeding confirming that a violation may have occurred.** Upon reaching agreement on settlement terms, the Division shall present the proposed settlement to the Commission for final acceptance or rejection; or . . .¹

¹ The modifications to the Rule proposed by Columbia and VNG are shown as bold underscored text.

Staff does not recommend that the Commission revise Rule 20 VAC 5-309-40 B as Columbia and VNG propose. The revisions recommended by these entities will serve to chill efforts to settle Commission cases. It is appropriate to encourage probable violators to obey the law and to improve their behavior, not to create burdensome or unnecessary proceedings under circumstances where probable violators are willing to alter their behavior. Ultimately, the Commission makes the decision on any acceptance of an Offer of Settlement.

Cox, AGC, and the VTIA criticize proposed Rule 20 VAC 5-309-40 B as undermining the function and purpose of the Advisory Committee. The Staff disagrees with this characterization of Rule 20 VAC 5-309-40 B. A discussion of the statutory and regulatory purpose of the Advisory Committee supports 20 VAC 5-309-40 B as it is currently framed. The Advisory Committee is not, as Cox asserts at page 3 of its comments, a surrogate jury for probable violations of the Underground Utility Damage Prevention Act.

Section 56-265.31 of the Code of Virginia directs the Commission to establish an Advisory Committee consisting of representatives from the utility operators, notification centers, excavators, municipalities, the Virginia Department of Transportation, the Virginia Board for Contractors, underground line locators, and the Commission Staff. The purpose of this Committee as articulated in §56-265.31 of the Code of Virginia is to

"perform duties which may be assigned by the Commission, including the review of reports of violations of the . . . [Act] and to make recommendations to the Commission."

Article II of the Advisory Committee's Bylaws describes the duties of the Advisory Committee as including, but not being limited to: (i) the review and making of recommendations to the Commission concerning reports of probable violations of the Act, (ii) the making of recommendations with regard to Public Education and Awareness Programs that further public safety by the reduction of damage to underground utility facilities in the Commonwealth, and (iii) the monitoring, analysis of, support for, or opposition to programs or regulations that directly affect damage to underground facilities serving the citizens of the Commonwealth.

The Commission appoints members to the Advisory Committee from a list of candidates provided by specific member stakeholders identified in the Act. Members of the Advisory Committee must have expertise relating to the operations that are subject to the Act.

I am advised by counsel that § 12.1-18 of the Code of Virginia permits the Commission to appoint, among other persons, "employees as may be necessary to the proper discharge of . . . [the Commission's] duties," In accordance with § 12.1-30.1 of the Code of Virginia, the Commission has defined its interaction with its Staff in Rules of Practice

and Procedure that have been adopted by the Commission. As noted in Rule 4:14, 5 VAC 5-10-260 of the Commission's Rules of Practice and Procedure, no member of the Commission Staff is considered a "party" to any proceeding before the Commission. This regulation explains that the purpose of the Staff is to aid the Commission in the proper discharge of the Commission's duties and provides that Commissioners are free at all times to confer with their Staff with respect to any proceeding." Provided, however, no facts not of record which reasonably could be expected to influence the decision in any matter pending before the Commission shall be furnished to any Commissioner unless all parties to the proceeding, other than interveners under Rule 4:7, be likewise informed and afforded a reasonable opportunity to respond."

The purpose of Rule 20 VAC 5-309-40 B, as proposed, is to give weight to the Advisory Committee's recommendations to the Commission, as well as to recognize the Staff's independent duty to assist the Commission in the proper discharge of the Commission's duties. The Advisory Committee's primary role in the Act's enforcement process is to review and make recommendations concerning probable violations of the Act. The Committee serves as an invaluable source of expertise in evaluating the merits of an alleged probable violation of the Act. However, ultimately, the Commission decides whether a penalty should be imposed, an Order of Settlement entered, or whether an alleged probable violation

should be the subject of a rule to show cause or dismissed. In Staff's view, its proposed rule properly balances the Staff's duty, which exists apart from Staff's participation on the Advisory Committee, to assist the Commission in the discharge of its duties, and the duty of the Advisory Committee to review and make recommendations to the Commission regarding alleged violations of the Act.

Q8. PLEASE REVIEW THE COMMENTS FILED IN RESPONSE TO STAFF'S PROPOSED RULE 20 VAC 5-309-90.

A8. AGC, Virginia Electric and Power Company ("Virginia Power") and Kentucky Utilities Company ("KU") commented on Staff's proposed Rule 20 VAC 5-309-90 which states:

Upon request, the Division shall provide to any person information or documents gathered by the Division in the course of the Division's investigation of probable violations under the Underground Utility Damage Prevention Act. Such documents or information may include a list of violations and probable violations of the Act, provided that such information or documents has not been determined by the Commission or a court of competent jurisdiction to be confidential or privileged.

AGC encourages the Commission to "*carefully consider the confidentiality of information gathered as part of investigations.*" Virginia Power noted that: "*... the Proposed Change is unwarranted. Information collected by Staff in connection with investigations under the Act would invariably involve disputed issues of fact, potential litigation or critical*

self-examinations by operators, excavators, locators, and property owners. Making such information freely available to the public, as contemplated by the Proposed Change, would discourage the frank exchange of information necessary to the Staff's investigative and administrative role under the Act. Also, liberal provision of such information, as proposed, could result in abuse by insurance carriers, plaintiff's attorneys, and others. Access to information should be limited to utility operators, locators, excavators, and property owners implicated in or directly affected by the investigation. Access to others should be available only pursuant to a court order or upon the consent of the affected parties."

Finally, KU recommended that *"the information provided be limited to information or documents of actual violations of the Act."*

The Commission has been, and continues to be, an open and accessible agency. The regulatory responsibilities given to the Commission under the Constitution of Virginia and by statutes like the Underground Utility Damage Prevention Act have a significant impact on the public. The Commission and our Division strive to provide as much information as possible given the nature of our work.

I am advised by counsel that the principal statute making Commission records available to the public is found in Virginia Code Section 12.1-19, which imposes a duty on the Clerk of the Commission to make "all of the records, documents, papers and files of the Commission ...

open to public examination ... to some extent as the records and files of the courts of the Commonwealth." The Clerk of the Commission has the powers and is to perform the duties "of a clerk of a court of record ..."

Thus, the Commission's records, including those in the files of the Division relating to the Underground Utility Damage Prevention Act ("Act") are made accessible to the public, in the same way as are those of any circuit court. Unless subject to privilege or a protective order, information made available to the Staff under the Act must be available for public review.

The rule proposed by the Staff in this rulemaking carries forward the spirit of this "open to the public" principle found in Section 12.1-19 of the Code of Virginia. Staff would hope that the proposed rule, if adopted, does not discourage the frank exchange of information necessary for the Division's investigative and administrative duties as related to the damage prevention program.

**Q9. MR. TAHAMTANI, PLEASE DISCUSS THE COMMENTS FILED
RELATIVE TO ARTICLE 5 OF THE PROPOSED RULES.**

A9. Article 5 of the proposed rules presents certain "thresholds" for reporting of probable violations of the Act by non-gas operators. The full text of these rules are set below:

20 VAC 5-309-100. Reporting requirements for electric operators.

All operators of electric utility lines shall report all probable violations of the Act to the Division involving damages impacting 1,000 or more customer meters and/or resulting in injury or fatality.

20 VAC 5-309-110. Reporting requirements for telecommunication operators.

All operators of telecommunication utility lines shall report all probable violations of the Act to the Division involving damages to outside facilities affecting 1,000 or more access lines.

20 VAC 5-309-120. Reporting requirements for cable TV and cable TV and telecommunication operators.

All operators of cable TV and cable TV and telecommunication utility lines shall report all probable violations of the Act to the Division involving damages to outside plant facilities impacting 1,000 or more customers.

20 VAC 5-309-130. Reporting requirements for water and sewer operators.

All operators of water and sewer utility lines shall report all probable violations of the Act to the Division involving damages resulting in an injury, fatality, or having serious impact on public health.

Ten of the parties filing comments in response to the Staff's proposed rules had various comments relative to the reporting "thresholds." Their comments range from suggested language to clarify the rules to recommending that the Commission reject certain of the proposed reporting requirements.

Q10. PLEASE CONTINUE.

A10. AEP-Virginia and the Cooperatives² believe Staff's proposed Rule 20 VAC 5-309-100 is appropriate and reasonable. However, they propose to clarify the reporting requirement for damages resulting in injuries. AEP-Virginia proposes to add the words "*requiring an overnight hospital stay*" after the word "injury." Staff agrees with AEP-Virginia to clarify reporting of damages to utility lines resulting in an injury. Staff proposes to require reporting of damages involving injuries that require "in-patient hospitalization." The Cooperatives recommend amending the requirements for reporting of accidents involving injuries and death by incorporating the federal OSHA statutes contained in 29 C.F.R. Subdivision 1904.8. Staff opposes the Cooperatives' recommendation. The Cooperatives' proposed revisions found at pages 3 and 4 of their August 1, 2000, comments deal with reporting only the injury or death of "any employee" of the Cooperatives. Damage to underground utility lines has the potential of causing injury or death of the employees of the excavators, the general public or utility employees if they happen to be around the facilities at the time of the accident.

² A number of Cooperatives filed joint comments. They include: A&N Electric Cooperative, BARC Electric Cooperative, Central Virginia Electric Cooperative, Community Electric Cooperative, Craig-Botetourt Electric Cooperative, Mecklenburg Electric Cooperative, Northern Neck Electric Cooperative, Northern Virginia Electric Cooperative, Powell Valley Electric Cooperative, Prince George Electric Cooperative, Rappahannock Electric Cooperative, Shenandoah Valley Electric Cooperative, Southside Electric Cooperative, Inc., and the Virginia, Maryland & Delaware Association of Electric Cooperatives (hereafter "Cooperatives").

**Q11. DO YOU HAVE FURTHER COMMENTS RELATIVE TO
PROPOSED RULE 20 VAC 5-309-100?**

A11. Yes, in order to further clarify this rule, Staff proposes to replace the word "impacting" after the word "damages" with the word "affecting".

Q12. PLEASE COMMENT ON PROPOSED RULE 20 VAC 5-309-110.

A12. This rule details the reporting requirements for the telecommunications industry. AGC and VTIA do not support the need for reporting any damages to telecommunications utility lines. ACG does not believe there are any public safety issues when a telecommunications line is damaged. Staff is of the opinion that damages to telecommunications facilities have and can disrupt critical calls to 911 and other emergency response services. If there is a fire or an individual is in need of fast and life saving assistance and the telecommunications system is unavailable because of damage caused by excavation, public safety is threatened.

VTIA recommends that the reporting requirements for the telecommunications industry be rejected because it *"is unwarranted and would impose an impractical requirement on telecommunication companies."*

According to the Commission's Division of Communications, the telecommunications industry reports significant outages to that Division for performance monitoring and to assist the Division in responding to

consumer complaints relative to these outages. As a result, the Staff's proposed rule for reporting telecommunication damages affecting 1,000 or more access lines should not impose additional requirements on this industry. The two Divisions of the Commission (Energy Regulation and Communications) would cooperate to ensure that a single filing of such reports is adequate for the needs of both Divisions. The reporting requirements noted in Rule 20 VAC 5-309-110 is warranted for public safety reasons noted earlier and for the enhancement of the damage prevention program in general.

Cox proposes that damages to telecommunications lines affecting 1,000 or more "customers" not "access lines" be reported.

VTIA notes that it is difficult to know when 1,000 customers are affected. When telecommunication facilities are damaged, Staff believes it is possible to know how many access lines are involved. It may not be easy, however, to determine how many customers are served by the lines. It is for this reason that Staff's proposed rule requires reporting of damages affecting 1,000 or more access lines.

Q13. PLEASE CONTINUE.

A13. AGC also opposes any reporting of "cable TV cuts." They note that there is no public safety issue involved with a cable TV cut.

The cable industry believes they provide an "essential public service" to the public because they are required to participate in the Emergency Alert System ("EAS") which is used for notification of national emergencies. The Federal Communications Commission ("FCC") has recognized that mandating cable industry participation in the EAS was of vital significance because "cable is an invaluable link in the dissemination of information during emergencies...." Further, the FCC requires cable companies to act promptly to resolve any signal leakage which may be caused by damage to their facility. Signal breakage interferes with radio navigation services and aeronautical radio communication, among others. Cuts in buried cables have leaked signals into the civil air patrol radio system in the past. For these reasons, Staff does not agree with AGC and believes that public safety can be affected by a cable cut.

Q14. DOES STAFF PROPOSE ANY REVISIONS TO RULE 20 VAC 5-309-120?

A14. Yes. In order to further clarify this rule, Staff proposes the following technical revisions shown in brackets.

20 VAC 5-309-120. Reporting requirements for cable TV and cable TV [~~and~~ /] telecommunication operators.

All operators of cable TV [utility lines] and cable TV [~~and~~ /] telecommunication utility lines shall report all probable violations of the Act to the Division involving damages to outside plant facilities [~~impacting~~ affecting] 1,000 or more customers.

Finally, AGC requests that the phrase, "having serious impact on public health" found in proposed Rule 20 VAC 5-309-130 be defined. Otherwise, if interpreted broadly, it could "require reporting of any water or sewer cuts."

Staff agrees with AGC and proposes to add a definition to Article "2" of the proposed rules. This definition would provide that:

"serious impact on public health" means any condition involving a water or sewer utility line that creates, or may create, a danger to the health and well-being of the public.

Staff also proposes to amend Rule 20 VAC 5-309-130 by replacing the word "and" after the word "water" with the word "or." This revision would clarify that operators that own only water utility lines or only sewer utility lines are also subject to this rule.

Several parties noted the absence of any proposed rules requiring the jurisdictional gas companies to report damages to their facilities. As the Commission may be aware, the gas companies have been reporting all damages caused by excavation to their facilities to the Division of Energy Regulation since March 1996.

Q15. MR. TAHAMTANI, WHY DID THE STAFF REQUIRE JURISDICTIONAL GAS COMPANIES TO REPORT ALL DAMAGES BEGINNING MARCH 1, 1996?

A15. In 1995, shortly after the new Act had become effective, Staff conducted a survey of 22 operators to determine, among other things, damage trends. Eight of the 22 operators were natural gas companies. During the six-month period ending October 31, 1995, 1,138 incidents involving the gas facilities were documented by the gas companies. Only 9 incidents or 0.8 percent were reported to the Division for investigation. Obviously, neither public safety nor an effective damage prevention program for gas utility lines can be achieved by enforcement actions relative to less than one percent of the gas incidents. Consequently, Staff required the jurisdictional gas operators to report all damages to their facilities effective March 1, 1996.

Q16. WHY DID THE STAFF CONCENTRATE ITS EFFORTS ON THE GAS INCIDENTS?

A16. Excavation damage to pipelines remains one of the leading causes of pipeline accidents. Preventing or decreasing these damages reduces the risk of loss of life, injuries, property damage, environmental damage, economic loss and service outages. The Staff's primary reason for concentrating on pipeline accidents was and continues to be as a result of its concern for public safety. As is obvious from the information on Attachment 2 of Appendix 1, the damage to gas lines has decreased significantly since 1996.

In fact, updating this data through August, 2000, shows a 47 percent reduction in damages.

This result is largely due to the gas companies' reporting of all damages and the fair and consistent enforcement process applied to these incidents. This activity, along with public education, has helped gas companies to protect their facilities and has enhanced public safety. Indeed, for the relatively small administrative costs associated with reporting gas damages, the utilities, the ratepayers and the public have greatly benefited.

Q17. COLUMBIA AND VNG HAVE QUESTIONED THE BASIS FOR THE REPORTING REQUIREMENTS PLACED ON THE GAS COMPANIES. WOULD YOU COMMENT ON THE STAFF'S POSITION RELATIVE TO THIS ISSUE?

A17. Yes. The Pipeline Safety Act, 49 USC § 60101 et seq. ("Pipeline Safety Act"), requires the Secretary of Transportation ("Secretary") to establish minimum federal safety standards for the transportation of gas and pipeline facilities. The Secretary is further authorized to delegate that authority to prescribe safety standards and enforce compliance with such standards over gas pipeline facilities used for intrastate transportation to an appropriate state agency. In order to receive such delegation from the Secretary, a state agency must submit an annual certification pursuant to 49 USC §60105.

This certification must state, among other things, that the state agency "... may require ... reporting ... substantially the same as provided under [49 USC] Section 60117." Subdivision B(1) of Section 60117 states, in part, that the "[owner or operator of pipeline facilities] shall ... make reports ... the Secretary requires."

The Commission has the authority to require reports under Section 56-249 of the Code of Virginia. This statute allows the Commission to require any public utility to provide reports in "... such form, at such time, and in such detail as the Commission shall require." The Commission has been designated as the appropriate state agency for enforcing pipeline safety for jurisdictional gas companies in Virginia by the Secretary.

Further, a reading of the Pipeline Safety Act reveals that the Secretary, or the designated state agency, may require operators of natural gas or hazardous liquid facilities to file reports of its various operations to enable the Secretary, or its designee, to evaluate an operator's compliance with pipeline safety regulations. The Commission Staff has required reports from gas utilities of all damages caused by excavation to monitor compliance with various parts of the Commission's gas pipeline safety regulations adopted in Case No. PUE890052.

Q18. PLEASE COMMENT ON COLUMBIA AND VNG'S PROPOSED REPORTING REQUIREMENTS FOR NATURAL GAS COMPANIES.

A18. These companies propose the following reporting requirements for gas companies:

All operators of natural gas pipelines shall report all probable violations of the Act to the Division involving: (i) damages resulting in a death or personal injury involving in-patient hospitalization; or (ii) estimated property damage (including cost of utility services lost) exceeding \$5,000.

Staff strongly recommends that Columbia and VNG's reporting requirement for gas companies be rejected.

Q19. PLEASE CONTINUE.

A19. Washington Gas Light Company ("WG") presents a similar reporting requirement as Columbia and VNG but proposes that damages involving less \$5,000 in property damage be reported in summary format periodically. Further, WG proposes to require that non-gas operators also periodically report damages that are not reportable under the Staff's proposed thresholds. The Company is, however, silent as to the possible use of these summary reports filed by the operators.

Staff is of the opinion that such summary reports are of little value. Unless the reports are investigated and brought before the Advisory Committee to determine the probable cause of the accidents, no creditable

trends can be established and monitored to assist in directing the Virginia damage prevention program.

Columbia Gas Transmission Corporation ("Columbia Transmission") proposes two separate reporting requirements as follows:

Reporting requirements for operators.

All operators of gas pipelines, electric utility lines, telecommunication utility lines, and cable TV lines shall report all failures to call the notification center.

Reporting Requirements for interstate pipelines.

All interstate pipelines subject to the requirements of 49 C.F.R. Subdivision 191 shall file with the Division a copy of all reports submitted to the U.S. Department of Transportation that also involve a probable violation of the Act.

Columbia Transmission's first proposed rule requires the reporting of those who fail to call the notification centers before they commence excavation. Although Staff does not object to the addition of this requirement to the proposed thresholds, our current data does not support giving emphasis to only one element of the Act, i.e., the excavator's responsibilities under the Act defined in Section 56-265.17 A of the Code of Virginia.

The Staff applauds Columbia Transmission for proposing to submit reports involving the probable violations of the Act to the Division even though this operator does not come under the Commission's pipeline safety

jurisdiction. Nothing prevents these operators to file reports involving probable violations of the Act to the Division now and they are encouraged to do so.

The Cooperatives noted that a reference to gas reporting requirements in the rules *"will serve as a valuable reference for those who may not be familiar with these requirements."*

Should the Commission decide to incorporate the reporting of gas damages in the final rules that may be adopted in this proceeding, Staff proposes the following language which also covers the jurisdictional hazardous liquid pipelines:

All operators of the jurisdictional intrastate natural gas and hazardous liquid pipelines shall report all probable violations of the Act affecting their utility lines.

Q20. WERE ANY COMMENTS FILED RELATIVE TO THE PROPOSED RULES CONTAINED IN ARTICLE 6?

A20. Yes. KU, Cox and Virginia Power provided comments relative to the rules in Article 6. KU is concerned that *"despite following the Emergency Excavation Procedures, it is entirely possible that an electric operator could hit a gas line when excavating to repair their own line. Without waiting for the line markings, despite best efforts, it is possible that a more severe accident could occur."* This has indeed happened when gas lines have been damaged during restoration of electric service. KU suggests that

the notification center be immediately notified and the utility and/or their locator immediately proceed to the site of the emergency to mark lines. The Staff's proposed rules require that the notification center be immediately contacted to request an emergency locate. The rules further require a determination of the need for immediate action upon arrival to the site. In some cases the personnel responding to the emergency may determine that immediate action must be taken to prevent a serious accident. In these cases, Staff has recommended certain common sense steps before any excavation is conducted. Otherwise, Staff is recommending that no excavation be done until the area is marked.

Cox proposes language to require all involved to attempt to coordinate "the response to the emergency within a prudent period of time after receipt of the notification." This proposal requires a step, which though reasonable in some cases, may be unwise in other instances (i.e., responding to a gas leak emergency).

Finally, Virginia Power recommends that the proposed requirement found in 20 VAC 5-309-140 3 b should be deleted. The Company argues that this requirement could be deemed to prevent operators from taking immediate action unless they have trained and equipped their employees to locate all types of utility lines. Staff's Proposed Rule 20 VAC 5-309-140 3 b. states:

Locate the underground utility lines with acceptable equipment, if possible.

Staff is of the opinion that the phrase "if possible" should address Virginia Power's concerns. If the personnel responding to the emergency are trained and have the equipment, then it would be prudent to use the knowledge and the available tools to conduct the emergency excavation in a safe manner. It is not Staff's recommendation to delay responding to an emergency, cause degradation of service restoration or increase the operator's costs. It is our belief that all reasonable precautions shall be taken to protect underground utility lines at the site of the emergency. Certainly no one, including Virginia Power, wants to restore electrical service, nick a gas line in the process and possibly cause an accident with severe consequences. Staff, therefore, encourages the Commission to adopt proposed rule contained in Article 6 in its entirety.

Q21. ARTICLE 7 OF THE STAFF'S PROPOSED RULES ADDRESSES THE MARKING OF UNDERGROUND UTILITY LINES. PLEASE SUMMARIZE THE COMMENTS RELATIVE TO THE RULES CONTAINED IN THIS ARTICLE.

A21. Campbell County noted in their comments that the use of the word "temporary" in Proposed Rule 20 VAC 5-309-150 could be confusing.

This rule states:

20 VAC 5-309-150. Temporary marking of underground utility lines.

All temporary markings shall, at a minimum, conform with the requirements of this article.

Staff agrees and proposes to delete the word "temporary" from this rule.

Cox proposes to amend Subdivision "D" of Rule 20 VAC 5-309-160 and add the words "at least" before the word "and." This subdivision states:

Paint marks shall be approximately 8 to 10 inches in length and one to two inches in width except when 'spot' marking is necessary.

According to Cox, this is necessary to clarify that the "width measurement is a minimum." Staff does not object to this change. Campbell County proposes to delete from the wording of this subdivision "except when 'spot' marking is necessary." The County claims that spot marking does not give direction. Staff is of the opinion that spot marking is a recognized marking method by the locating industry. As a result, Staff does not agree with the County's proposal.

Washington Gas Light Company, Columbia and VNG commented on Subdivision "F" of Rule 20 VAC 5-309-160. This subdivision states:

All valve box covers shall be marked with the appropriate color in accordance with the Act.

Staff agrees with WG's proposal to only require that valve box covers that are at grade and visible be marked.

Columbia and VNG argue that the Act does not contemplate the marking of valve box covers and Subdivision "F" is beyond the scope of the Act and should be deleted in its entirety. Staff does not agree with Columbia and VNG. Section 56-265.15 of the Code of Virginia defines a "utility line" as:

utility line means any item of public or private property which is buried or placed below ground or submerged for use in connection with the storage or conveyance of water, sewage, electronic, telecommunications, electric energy, cable television, oil, petroleum products, gas or other substances, and includes but is not limited to pipes, sewers, combination storm/sanitary sewer systems, conduits, cables, valves, line, wires, manholes, attachments and those portions of poles below ground....

In our opinion a valve box cover is part of the utility line and should be marked as proposed by Rule 20 VAC 5-309-160, Subdivision F, as Staff has further amended it in Appendix 2 to this testimony.

Several parties commented on Subdivision "G" of this rule which states:

If in the process of marking an underground utility line, a customer-owned underground utility line is discovered, the operator or its contract locator shall make every effort to contact the customer to advise him of the presence of the line.

Columbia and VNG acknowledged the public safety goal inherent in the proposed rule, but noted that the Act does not contemplate any such obligation on the part of operators or contract locators. Virginia Power noted that requiring operators to *"make every effort"* to contact the customer to advise him of the presence of a customer-owned line would place an impractical obligation upon the operators. Virginia Power also noted that the proposed rule *"does not address the safety concern relative to an excavator not being aware of an unmarked customer-owned line."* Virginia Power has proposed the following language to replace the Staff's proposed rule.

If in the process of marking an underground utility line, a customer-owned underground utility line of the same type is discovered, the operator or its contract locator shall make a reasonable effort to advise the excavator of the presence of the line within a reasonable time.

Staff agrees with Virginia Power's proposed language but notes that excavators are supposed to be notified under the current notification center system if the operator or their locators use the proper Ticket Information Exchange ("TIE") system subcodes. Subcode "62" when used by the operators or their locators, means the operator's utility lines have been marked up to privately-owned lines. An excavator that gets this code is expected to contact the privately-owned line operator and arrange for marking. In reality, however, an excavator may choose to wait 72 hours

and not contact the TIE system to get any codes or subcodes before excavating. By requiring operators to make a reasonable effort to contact the owner of the privately-owned line, the owner is given an opportunity to mark those facilities.

The Staff recommends that Subdivision "G" be amended as follows:

If in the process of marking an underground utility line, a customer-owned underground utility line of the same type is discovered, the operator or its contract locator shall make a reasonable effort to contact the excavator or the customer to advise of the presence of the line.

Columbia and VNG recommend that Subdivision "I" of Rule 20 VAC 5-309-160 be eliminated. This subdivision states:

All markings shall extend at least 10 feet beyond the boundaries of the specific location of the proposed work as detailed on the ticket.

Staff understands the concerns raised by these two operators relative to access to adjacent properties in order to comply with this rule. They also note that such a requirement is beyond the scope of the Act. Staff is of the opinion that the Act does not limit the operator's ability to comply with this proposed rule to provide a few feet of additional marking that may prevent an accident. The "Common Ground"³ report states as a damage prevention "best practice" that: "[a]ll marks extend a reasonable distance beyond the

³ Common Ground, Study of One-Call Systems and Damage Prevention Best Practices" issued in June 1999 by the U.S. Department of Transportation's Office of Pipeline Safety.

bounds of the requested area." Having considered the comments and this best practice, Staff proposes to amend Subdivision "I" as follows:

All marks shall extend, if possible, a reasonable distance beyond the boundaries of the specific location of the proposed work as detailed on the ticket.

Several parties raised concerns relative to Subdivision "J" of proposed Rule 20 VAC 5-309-160. This subdivision states:

In an area designated as a historic location, stakes or flags with appropriate color coding shall be used instead of paint, to the extent practical.

Columbia and VNG noted that the boundaries of historical areas may not be well known and may require operators or their locators to document the existence and the scope of such areas. Accordingly, these companies recommend that the word "shall" in this proposed rule be changed to "may." VCTA argues that a "historic location" should be defined and the presence of a historic location should be provided through the notification process to the operator or his locator. Cox agreed with VCTA that the presence of these areas should be provided to the locators by excavators.

Obviously, the use of various colored paints to mark on hard surfaces, brick sidewalks for example, in areas such as Colonial Williamsburg has a visual impact that should be minimized.

However, after reviewing comments relative to Subdivision "J" and "K," Staff proposes to delete Subdivision "J" of this rule. Subdivision "K" can be amended to note historical location as an example of a "property." Further, Staff proposes to replace the words "would be" after the word "marking" by the word "is" in this rule. The revised rule provides:

If the use of line marking is damaging to property (driveways; landscaping; and historical locations, if known), 'spot' marking or other suitable marking methods shall be used.

Cox recommends that Subdivision "L" of Rule 20 VAC 5-309-160 be deleted. This subdivision states:

Markings shall be valid for an excavation site for 15 days from the time of notification by the excavator or until one of the following events occurs:

- 1. The markings become faded, illegible or destroyed; or*
- 2. An emergency condition no longer exists.*

Cox notes that the proposed rule does not add anything and is "superfluous." The Act puts the responsibility on the excavator to contact the notification center and request the remarking of lines when the marks become illegible or destroyed. It does not expressly address how long markings placed on the ground for an emergency excavation are valid. The proposed rule addresses this issue. As a result Staff does not agree with Cox's recommendation to delete Subdivision "L."

Virginia Power recommends that Subdivision "M" be deleted. This subdivision states:

All utility lines of the same type in the same trench owned by the same operator shall be marked individually or by a single mark. If a single mark is used, the number of the utility lines shall be indicated at every other mark.

The Company states in its comments that: "[t]he proposed requirement is impractical because it assumes that operators maintain very detailed installation records such as surveyor construction drawings.... Virginia Power does not maintain such detailed maps because they are unnecessary and would be extremely expensive to prepare and maintain. The electric mapping used by Virginia Power can show that due to multiple installations or to cable replacement, "x" number of cables (six for example) are in the right-of-way. It cannot show that three are in one trench, two in another trench, and one in a third trench. To comply with this proposed requirement, Virginia Power would have to re-map all of its facilities and a Virginia Power serviceman would have to de-energize all lines and dig down to count cables serving hundreds of thousands of customers. Such an effort would be extremely expensive, yet without any appreciable benefits. Proper locating techniques and reasonable care by the excavator are much more practical and effective in preventing damage to underground facilities and minimizing the likelihood of personal injury."

As noted in the table presented on page 27 of Appendix 1 to this testimony, 76 percent of those providing comments in response to the Commission's December 13, 1999, Order supported marking of multiple utility lines of the same type so that the excavator knows how many lines he has to protect while excavating. Often one mark is placed on an area that contains several conductors. The excavator uses reasonable care to excavate and finds one line. Assuming one mark means one line, he proceeds and damages other lines. The "Common Ground" Report recommends as a "best practice" to mark multiple facilities in the same trench individually and with corridor markers. Virginia Power acknowledges their existing records can show how many cables are in a right-of-way. This information is sufficient and should be communicated to the excavator so he knows how many lines he needs to protect as he excavates in proximity to these lines. Clearly, the Staff is not advocating that Virginia Power shut down systems to count the number of cables to re-map their facilities.

Columbia and VNG propose to amend Subdivision "N" so that operators or locators are required to utilize "all information necessary under the circumstances" to assure an accurate marking. This subdivision states:

Operators or their contract locators shall use all available information, including but not limited to, the installation records of utility lines to mark their facilities accurately.

Considering these companies' comments, the Staff proposes to amend Subdivision "N" as follows:

Operators or their contract locators shall use all information necessary to mark their facilities accurately.

**Q22. PLEASE DISCUSS THE COMMENTS RELATIVE TO PROPOSED
RULE 20 VAC 5-309-180.**

A22. This rule states:

Every operator required by § 56-265.16:1 A of the Code of Virginia to join the notification center shall provide an update of the data relative to the operators' utility lines to the notification center as soon as possible, but no later than 15 days after a utility line is installed.

Virginia Power and VCTA apparently misunderstood the meaning of the phrase "the data relative to the operator's lines" found in this rule. The intent of this proposed rule is to require the operators to provide the notification centers with such data that will allow proper notification of excavation activities near the operator's underground utility lines. Clearly, the rule does not contemplate providing "detailed drawings of new installation" unless such detailed records would be necessary by the centers. Staff is well aware of the current requirements by the centers and understands that these requirements do not include detailed drawings of utility installations. However, Staff is of the opinion that the information necessary for proper notification is not provided by some operators to the

centers on a timely and regular basis. If the centers do not have the information relative to the existence of utility lines, they cannot notify the operator of the excavation activities around those utility lines.

Fairfax County Wastewater proposes to add the following language after the word "installed."

or in the case of sanitary sewer, no later than 15 days after the utility lines is accepted by the operator.

Staff takes no objection with the County's proposal. After considering the comments filed relative to this rule, Staff proposes to amend this rule as follows:

Every operator required by § 56-265.16:1 A of the Code of Virginia to join the notification center shall provide to the notification center data that will allow proper notification to the operator of excavation near the operator's utility lines. This data shall be provided as soon as possible, but no later than 15 days after a utility line is installed, or in the case of sanitary sewers, no later than 15 days after the utility line is accepted by the operator.

Q23. STAFF'S PROPOSED RULE 20 VAC 5-309-190 DETAILS EXCAVATOR'S RESPONSIBILITIES TO AVOID DAMAGES, DISLOCATING OR DISTURBANCE OF UTILITY LINES. DID ANY OF THE PARTIES COMMENT ON THIS RULE?

A23. Yes. Capco Construction Corporation ("Capco") commented on Subdivision "2" of this rule. This subdivision states:

The excavator shall maintain a reasonable clearance, to include the width of the utility line, if known, plus 24 inches, between the marked or staked location of an underground utility line and the cutting edge or point of any mechanized equipment, considering the known limit of control of the cutting edge or point to avoid damage to the utility line;

Capco suggests that the word "horizontally" be added after the word "inches" in Subdivision "2." Staff has no objection to this proposed change.

Virginia Power proposes to amend Subdivision "3" of this rule. This subdivision states:

The excavator shall provide proper support for underground utility lines during excavation activities. During backfill operations, the excavator shall use proper backfill material, ensure there is proper compaction around the utility line, and protect all utility warning tapes and tracer wires.

Virginia Power proposes to replace the word "proper" with the words "the same or similar type" and after the word "material" add the words "that was originally around the utility line" to Subdivision "3." Staff does not object to these changes.

Columbia and VNG believe that requiring excavators to protect utility warning tapes is "unduly burdensome and unnecessary and not likely to avoid damage." Utilities such as Columbia incur great expense placing warning tapes on top of their facilities to warn excavators as to the presence of utility lines. Why a utility does not want excavators to protect the tapes,

or replace them if damaged, is difficult to understand. Are the tapes put in to warn the first excavator or are they to help protect the line every time excavation takes place on top of the line? Warning tapes have proved to be very effective in helping to protect underground utility lines. As a result, Staff does not agree with Columbia and VNG's proposal to delete the language relative to warning tape in Subdivision "3" of this rule.

**Q24. PLEASE DISCUSS THE COMMENTS RECEIVED ON PROPOSED
RULE 20 VAC 5-309-210.**

A24. Proposed Rule 20 VAC 5-309-210 requires that operators maintain accurate records for all new underground utility lines installed after July 1, 2001, excluding electric, telephone, cable TV, water and sewer service lines. Columbia and VNG believe that this rule is beyond the scope of the Act, and the limitation of its applicability to non-gas service lines is without justification. Roanoke Gas, WG, RCN Telecom Service of Virginia, Inc., and KU recommend that exclusion for non-gas service lines be eliminated, thereby requiring all utilities to maintain reasonably accurate records of all of their facilities. Columbia Transmission proposes to require reasonably accurate installation records of the location of the utility lines be maintained during the period they are in service.

Virginia Power discussed its existing records and noted that although it does not oppose the notion of standardizing installation records, the

definition of installation records found in Article 2 of the proposed rules caused it concerns. The Company expressed that this definition in concert with Rule 20 VAC 5-309-210 may require the Company to *"prepare installation records with such detail as to even specify when lines are routed around underground obstacles such as boulders."* Further, Virginia Power believes that maps and other installation records should be viewed as a tool to assist locators to locate the facilities. According to Virginia Power, an excavator is responsible for conducting careful excavation. This responsibility should not be shifted to operators by requiring detailed installation records.

WG noted that Staff needs to "promote safety by requiring reasonably accurate installation records particularly for underground electric lines...." WG noted in detail the danger from damage to electric lines and noted that records will assist all utilities in accurately marking their facilities.

Staff believes that both the definition of "installation records" and Rule 20 VAC 5-309-210 are reasonable. The intent here is to require the operators to maintain records that will assist them or their contract locators in accurately marking their facilities.

Staff proposes that the word "phone" be replaced with the word "telecommunication" in this rule.

Several parties commented on the requirement of keeping records of abandoned utility lines included in this rule. Although, knowing where the abandoned facilities are and somehow communicating that to the excavators will, no doubt, further damage prevention; Staff is of the opinion that requiring marking of abandoned lines is beyond the scope of the Act. As a result, Staff proposes to delete the last sentence in this rule and the proposed definition of "Abandoned utility line" in Article "2."

Q25. PLEASE COMMENT FURTHER ON PROPOSED RULE 20 VAC 5-309-210.

A25. Several commentors were apparently confused by the language in Proposed Rule 20 VAC 5-309-210. They commented that it was unfair not to require electric, telecommunications, cable TV, water and sewer service lines to maintain reasonably accurate installation records for underground line.

The intent of this proposed rule was to exclude electric, telecommunications, cable TV and water and sewer service lines from the recordkeeping obligation and to request all operators to maintain reasonably accurate installation records for all other new underground lines, e.g., mains, transmission lines, etc., installed after July 1, 2001. Staff proposes the following revision to 20 VAC 5-309-210 to avoid further confusion:

The operator shall prepare and maintain reasonably accurate installation records for all new underground utility lines installed after July 1, 2001, with the exception of new electric, telecommunications, cable TV, water and sewer service lines.

Q26. PLEASE EXPLAIN APPENDIX 2 TO YOUR TESTIMONY.

A26. Appendix 2 is the Commission's existing rules and the Staff's proposed rules as appended to the Commission's June 14, 2000, Order. The revisions proposed in my testimony involving deletion of certain language are shown by stricken underscored text in brackets. Those involving addition of language are shown by underscored text in brackets.

Q27. DOES THIS CONCLUDE YOUR TESTIMONY?

A27. Yes, it does.